Filed 9/23/03 In re N.H. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In Re N. H., A Person Coming Under the Juvenile Court Law. DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. A. H., Defendant and Appellant.	B164001 (Los Angeles County Super. Ct. No. CK48208)

Appeal from an order of the Superior Court of Los Angeles County. V. Skeba, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Andrea R. St. Julian, under appointment by the Court of Appeal, for Defendant and Appellant.

Lloyd Pellman, County Counsel, Kathleen Dougherty Felice, Senior Deputy County Counsel, for Plaintiff and Respondent.

In this dependency case, appellant A. H. was initially determined to be the presumed father of the minor child N. H. ("appellant," and "the minor," respectively), because of his marriage to the minor's mother. However, the dependency court ultimately determined that appellant could not possibly be the minor's biological parent, and further determined that this is an appropriate case to make such a finding and rebut the presumption of parental status because there was no parent-child relationship between appellant and the minor.

Appellant asserts these findings and determinations have prevented him from participating in the jurisdiction and disposition hearings and resulted in a denial of reunification services, and thus require reversal of the disposition order. Appellant further contends the trial court failed to meet "notice" duties placed upon it by the Indian Child Welfare Act, and failed to consider placing the minor child with his brother, and these matters also require reversal of the disposition order.

Our examination of the record and relevant law reveals there was no abuse of discretion in the trial court's determination that this is an appropriate case in which to determine that appellant is not the minor's presumed father. Moreover, all of the other trial court errors asserted by him are either without basis, or he lacks standing to assert them. We will therefore affirm the disposition order.

BACKGROUND OF THE CASE

1. *The Original and Amended Petitions*

The Department of Children and Family Services ("the Department") filed the original dependency petition in this case on July 30, 2002, when the minor was five

months old. The minor was detained when the police were called to the motel where the child and the child's mother ("Mother") were residing. The police received a report that Mother and appellant were engaged in a violent altercation. Mother was arrested at the scene. Appellant was on parole at the time, and he admitted that a condition of his parole was that he not have contact with Mother, yet he went to her residence anyway. He and Mother were married at the time.

A first amended petition was filed on September 4, 2002. The sustained allegations in the amended petition include facts bringing the minor child within the provisions of section 300, subdivisions (b) and (j), to wit, that on July 26, 2002, the minor was exposed to a violent confrontation between Mother and the appellant, and that the minor's half-sibling is a former dependent of the court with whom Mother failed to reunify, and such conduct endangers the minor's physical and emotional health and safety. The court also sustained an allegation that Mother has a history of substance abuse that periodically renders her incapable of providing regular care for the minor.

2. *The Detention Hearing*

The Department's detention report addresses the question of appellant's paternity of the minor. Mother told the Department that she only put appellant's name on the minor's birth certificate because she and he were still married when the minor was born. She asserted that appellant was in prison when the minor was conceived and appellant is not the child's biological father. Appellant told the social worker he was not sure he was the child's biological father but because he was listed on the birth certificate, he believed

he could legally claim to be her father. He indicated he would take a DNA test to determine paternity.

At the July 30, 2002 detention hearing, the court found a prima facie case for detaining the minor, and found that appellant is the child's presumed father. The court ordered family reunification services and monitored visitation for Mother and appellant, and set a mediation date of August 20, 2002. Appellant asked that the minor, who was in foster care, be placed with appellant's brother.

3. *Representations Regarding Paternity and the Indian Child Welfare Act*

At her arraignment hearing on August 2, 2002, Mother filled out a paternity questionnaire wherein she indicated that someone named "Ron" is the minor's father. On that same day, the court made a second finding that appellant is the minor's presumed father based on Mother's marriage to appellant. Mother indicated there is American Indian heritage in her background by way of her maternal grandfather, and the court ordered the Department to "notice one of the federally recognized Cherokee tribes." The court directed the Department to notify the Cherokee in Oklahoma to determine if this case falls within the Indian Child Welfare Act.

By written request dated August 13, 2002, the Department asked the Bureau of Indian Affairs in Sacramento to confirm the minor child's status as a Native American. The Department indicated in the request that Mother is affiliated with the Cherokee tribe. Additionally, the Department notified the Cherokee Nation of Oklahoma of the dependency case and the date of a mediation conference. The form used to notify the Cherokee Nation sets out rights provided by the Indian Child Welfare Act, including,

among others noted, the right of the biological parents, the Indian custodians and the child's tribe to intervene in the dependency proceedings.

On August 20, 2002, the federal Bureau of Indian Affairs in Sacramento notified the Department that its "P.L. 95-608 Indian Child Welfare Act (25 U.S.C. 1901-1952) notice regarding [the minor child was] being returned to [the Department] for the following reason(s): [¶] Insufficient identifying tribal information. . . .

The Department sent another request to the Bureau of Indians Affairs for confirmation of the minor's status as a Native American. It was dated September 12, 2002, and it contained additional information that concerned the maternal grandparents. It also sent another notice to the Cherokee Nation that the minor child was involved in the dependency case; this notice listed only very limited information about appellant and Mother.

The Bureau of Indian Affairs sent the Department a letter dated September 18, 2002, in which it again informed the Department that insufficient information had been sent. The letter also stated that it was not to be construed as a notice that the minor is or is not an Indian child under the provisions of the Indian Child Welfare Act, and notice to the Bureau "is not a substitute for serving notice on the identified federally recognized tribe."

4. *Mother's and Appellant's History*

On August 23, 2002, the minor was replaced to a different foster home to keep her placement secret because, according to the Department, "Father was acting very strange at the monitored visits." On August 28, Mother told the social worker that appellant

knew the not-to-be-disclosed address of the foster home from which the child was replaced because appellant followed the child home from one of his visits with her. Mother described appellant as a "stalker." The termination report for the first foster placement states that "[o]verall, [appellant] demonstrated pervasive patterns of agitated, aggressive and sometimes incongruent thinking and behavior more times than not during visits [with the minor child] perhaps indicating a need for a professional evaluation."

An August 30 addendum report on the amended petition states that appellant's criminal background shows he was committed to Patton State Hospital as being insane. Mother reported him to have a history of mental problems, and said he was diagnosed with schizophrenia, paranoia, psychosis with delusion and increasing violence. Subsequent reports from the Department question appellant's mental stability. The Department's reports state that appellant was not interested in having custody of the minor. Both appellant and Mother have a history of drug use and criminal activity. Mother was residing in a county jail facility at that time, and was due to be sentenced in August 2003 for possession of a narcotic controlled substance. (On August 23, 2002, Mother was placed on formal probation for three years under the terms and conditions of proposition 36.)

5. *The September 10, 2002 Mediation Date*

By the time of the scheduled September 10, 2002 mediation, appellant had been arrested on false imprisonment charges, with Mother being his alleged victim. He was reported to have also battered her.

The court indicated the Department's notices regarding the minor child's Native American heritage were not proper because more information needed to be given to the tribe since it is the tribe, and not the Bureau of Indian Affairs that determines Indian heritage. The court indicated the Bureau only becomes involved if the court can't identify a tribe.

6. *The October 1, 10 and November 4 Hearings*

A one-page report for the dependency court from the Department indicates appellant spoke with the children's social worker and admitted that he might not be the minor child's father. Appellant stated he wanted a paternity test. At the October 1 trial setting hearing, appellant observed that he had not yet been ordered to DNA testing, and the court replied: "Well, sir, I found you to be a presumed father. That means as far as I'm concerned you are the father. And I've made my ruling. If somebody wants to question it, then they can. But I found that you were the father." The court indicated the Department had again failed to provide proper notices to the Cherokee tribe and it ordered the Department to re-notify the Cherokee Nation.

On October 10, the Department presented the court with a report concerning appellant's having again obtained information about the minor's confidential residence. The report states that this time, appellant left a note at the foster home on October 1, stating he would like to visit the minor. Appellant also called the confidential foster home twice and he came to the front door of the home. The child was uprooted and replaced again to a new foster home, the third one.

On November 4, Appellant again requested DNA testing to determine whether he is the minor's biological father. Initially he stated he only wanted the test to determine the truth about who the minor's father really is, however, later in the hearing he indicated he would "like to not be considered [the minor child's] father." The court stated the matter of DNA testing would be considered at the trial.

7. *The Adjudication and Disposition Hearings*

Trial began on November 6, 2002, with the court receiving into evidence Department reports. Mother testified. The court determined there had been a violent confrontation between appellant and Mother on the night the minor child was removed from Mother's care, and further determined Mother periodically uses drugs, and thus concluded the minor is a child described by section 300 of the Welfare and Institutions Code over whom the court has jurisdiction.

The court addressed the issue of appellant's paternity of the minor. Mother testified she married appellant in July 1998 and at the time of the hearing had been living separate from him for a few years. She stated she lived with appellant off and on for approximately six months and they were not living together when the minor child was conceived, nor when the child was born. She stated she believed that someone named "Ron" is the child's father.

Appellant indicated to the court that he was incarcerated on March 26, 2001, and released on January 19, 2002. Appellant stated it was continuous incarceration, and he had no conjugal visits with Mother. Based on the fact that the minor was born on February 5, 2002, the court concluded that appellant could not be the child's biological

father, and it stated its conclusion was based on clear and convincing evidence. Based on such conclusion, and on the type of relationship appellant and the minor had, the court determined that its earlier finding of presumed paternity, which it had based on the fact that appellant and Mother were married when the child was born, was erroneous. Regarding the matter of appellant's relationship with the minor, the court found that the child was five months old when removed from Mother's care, and there was little, if any, relationship between the child and appellant. Reunification services were denied to appellant.

The record shows that while appellant visited the minor several times after the case was filed on July 30, 2002, by the end of that year appellant had not visited on a regular basis. The record does not show that appellant visited the minor prior to the inception of this case, nor that he ever, at any time, assumed any parental responsibility for her or stated he wanted custody of her.[1]

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[1] Appellant asserts that "[f]rom the very moment [the minor child] was taken into custody, [he] asked that [the child] be placed in his physical custody." He cites to page 9 of the clerk's transcript to support this assertion, which is a page from the Department's addendum report for the detention hearing.

While it is true that page 9 states: "The child's father . . . has indicated his interest and ability to provide the child . . . with the ongoing care and supervision, and the basic necessities of life," this sentence is followed by one that states: "Please see the attached Detention Hearing report for details." Our review of the Department's detention hearing report presents no indication that appellant wanted to care for the minor. Moreover, according to the reports filed by the Department for the adjudication/disposition hearings (clerk's transcript, pages 46 & 66), appellant's position has been that he wanted the minor child returned to Mother and did not wish to care for the child himself.

On November 18, 2002, appellant filed an application for rehearing of the findings and order of the dependency court respecting his paternity of the minor child. The application was denied on December 2, 2002, without a hearing.

At the December 18, 2002 disposition hearing, the minor was found to be a dependent of the court. Custody of the child was placed with the Department, and Mother was given reunification services.

Appellant filed his appeal on January 2, 2003. He filed a second notice of appeal the next day.

DISCUSSION

1. *There Was No Abuse Of Discretion In the Court's Finding That Appellant's Section 7611 Presumed Father Status Has Been Rebutted*

Family Code section 7540[2] provides that except in a situation not relevant here, "the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." In the instant case, there was evidence that Mother and appellant cohabitated for only a few months. Mother testified at the adjudication trial that she married appellant in July 1998, that they lived with him off and on for approximately six months, and that at the time of the hearing, when the minor child was nine months old, she had been living separate from him for a few years.

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[2] Unless otherwise indicated, hereinafter, references to statues are to the Family Code.

Clearly this evidence, if believed by the trial court, required a finding as a matter of law that there was no *conclusive* presumption of paternity under section 7540.[3]

Section 7611, provides that a man will be presumed to be the natural father of a child if he meets (1) the conditions in section 7540 et seq., (2) the conditions in section 7570 et seq. (which deal with voluntary declarations of paternity made pursuant to the procedures in such sections), or (3) the conditions set out in section 7611 itself, which include, among others: "(a) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court. [¶s] (d) He receives the child into his home and openly holds out the child as his natural child."

In the instant case, only subdivision (a) of section 7611 applies. Appellant and Mother have been married to each other, and the minor child was born during the marriage. Thus, there was a presumption that appellant was the child's father. However, except in circumstances not relevant here, a presumption arising under section 7611 is

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[3] The conclusive presumption of section 7540 is not truly conclusive since is can be rebutted "if the court finds that the conclusions of all the experts, as disclosed by the evidence based on blood tests performed pursuant to Chapter 2 (commencing with Section 7550 [addressing genetic testing]), are that the husband is not the father of the child." (§ 7541.)

rebuttable, "and may be rebutted, in an appropriate action, . . . by clear and convincing evidence." (§ 7612, subd., (a).)[4]

The trial court stated it received such clear and convincing evidence when it learned the facts of appellant's incarceration. Appellant told the court he was incarcerated continuously from March 26, 2001 to January 19, 2002, and he stated he had no conjugal visits with Mother. Based on the fact that the minor was born on February 5, 2002, that is, ten months and ten days after appellant's incarceration began, we find the court had substantial evidence to reasonably concluded that appellant could not be the child's biological father.

However, receipt of clear and convincing evidence is not the only consideration to be addressed by a court in determining whether a section 7611 presumption of paternity should be considered rebutted. As noted, section 7612, subdivision (a) provides that a presumption arising under section 7611"*may*" be rebutted, "*in an appropriate action*" by clear and convincing evidence. (Italics added.) In *In re Nicholas H*. (2002) 28 Cal.4th 56, the court held that under these italicized portions of section 7612, a presumption

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[4] While subdivision (a) of section 7612 states that a presumption of paternity arising under section 7611 *may* be rebutted, *in an appropriate action*, subdivision (c) of section 7612 provides that a presumption of paternity under section 7611 *is* rebutted when there is a judgment establishing another man's paternity of the child.

Appellant's contention that under section 7612, a section 7611 presumption can *only* be rebutted if there is a judgment establishing the paternity of another man is a gross misreading of section 7612. If appellant were correct, what would be the purpose of subdivision (a) of section 7612, or of subdivision (b) of section 7612, which states that when two or more section7611 presumptions arise and they conflict with each other, "the presumption which on the facts is founded on the weightier considerations of policy and logic controls."

arising under section 7611 is not necessarily rebutted when, for example, a section 7611 presumed father seeks paternal rights but admits he is not the child's biological father. The court stated: "When it used the limiting phrase *an appropriate action*, the Legislature was unlikely to have had in mind an action like this—an action in which no other man claims parental rights to the child, an action in which rebuttal of the section 7611(d) presumption will render the child fatherless. Rather, we believe the Legislature had in mind an action in which another candidate is vying for parental rights and seeks to rebut a section 7611(d) presumption in order to perfect his claim, or in which a court decides that the legal rights and obligations of parenthood should devolve upon an unwilling candidate." (*Id*. at p. 70.) Thus, the court stated that a man will not lose his presumed father status merely because he is not a child's biological father. (*Id*. at p. 63.)

While it is true that in the instant case there is no other man claiming paternal rights to the minor child, we do not find that such a fact precluded the trial court from determining that appellant's section 7611 presumption of paternity should be considered rebutted. This case is quite factually dissimilar to *Nicholas H*., where the presumed-but-not-biological father had welcomed the minor child into his home for long periods of time, provided the child with significant financial support during that time, and consistently referred to the child as his son and so treated him, and where the child had a strong emotional bond with the presumed-but-not-biological father. (*In re Nicholas H*., *supra*, 28 Cal.4th at p. 61.) Here, appellant did not take the child into his home, did not hold the minor out as being his child, and it does not appear that he provided significant,

if any, financial support for the minor. Moreover, his contact with the nine-month-old child had been quite limited.

California courts have recognized that the state's paternity presumptions are based on the state's interest in the welfare of children and *preserving* the integrity of the family, including *developed* parent-child relationships which afford children social and emotional strength and stability, and these considerations, in effect, can substitute for biological ties. (*In re Nicholas H.*, *supra*, 28 Cal.4th at p. 65.) A finding that appellant's presumed father status was rebutted could in no way be detrimental to a family relationship or a developed parent-child relationship between appellant and the minor because there were no such relationships, and the trial court so found.

Whether to find that appellant's presumed father status was rebutted was a matter within the court's sound discretion (*In re Nicholas H.*, *supra*, 28 Cal.4th at p. 59), and we cannot say that the court abused its discretion in finding that the presumption was rebutted by the evidence of appellant's extended incarceration and the lack of a meaningful relationship between him and the child.[5]

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[5] Indeed, we cannot even say that the record would support a finding that it would be in the minor's best interest to *develop* a relationship between appellant and the child. The record shows the child had to be replaced twice to new foster homes because appellant insisted on going to the confidential residences where the child was placed. Replacement interferes with a child's sense of stability. Moreover, the foster family agency reported to the Department that it was concerned about the safety of its staff and its foster parents, and while the children's social worker suggested that appellant's monitored visits with the minor take place at a Department office with the safety police present, the foster family agency staff indicated they were still concerned and they did not want the child and appellant in their system.

2. *Because His Status As A Presumed Father Was Rebutted, Appellant Was Not Entitled To Participate In The Disposition Hearing, And To Reunification Services*

Appellant asserts that because he was denied presumed father status, he was precluded from participating in the adjudication and disposition hearings and denied reunification services, and he contends such preclusion and denial were wrong.

The record further shows appellant had a lengthy criminal record. The jurisdiction/disposition report from the Department states his offenses include substance abuse and possession, trespass, theft, burglary, carrying a loaded firearm in public, and shooting at an occupied dwelling. He admitted to being on parole and having two felony "strikes" against him; and he admitted that a condition of his parole was that he not have contact with Mother, yet he went to her residence on more than one occasion.

Moreover, during the pendency of this case, appellant was arrested for falsely imprisoning Mother, and was reported to have also battered her. Even after the adjudication hearing, appellant continued to cause problems for Mother. At the disposition hearing, the court was informed that Mother had been terminated from her reunification classes because appellant showed up at them and threatened the staff, and Mother had to call the police on appellant the preceding night. The court observed that appellant had come to court that very day looking for Mother.

Additionally, the children's social worker questioned whether appellant would benefit from reunification-type classes such as domestic violence and parenting, saying that appellant has problems following directions, and interrupts when being spoken to (something the trial court observed at more than one hearing).

Reports on appellant's second and third visits with the minor child are also disturbing. He was reported to be frustrated and agitated over policies, "often unreasonable, and hostile," and concerned that either someone had switched the minor child with another child or had inserted blue contacts into the minor child's eyes. He insisted that the child he visited with the prior week had brown eyes.

It was reported that during a visit with the minor, appellant was angered by a comment about the minor's formula and he stated to the child: "that's how social workers get smashed in the face." He also used obscenities. Speaking to the minor child, he used the word "fuck" at least five times.

Citing only section 7612, appellant contends that denial of presumed father status is permitted only if there is another man who asserts such a status. The fallacy of appellant's position is demonstrated by a review of this list of reasons why it would not be in the best interest of the minor child to allow a relationship to develop between the minor and appellant by preserving his presumed father status.

However, because we have determined that the trial court did not abuse its discretion in determining appellant is not a presumed father, we cannot say that denying him participation in court hearings and reunification services was erroneous.

"The Family Code and the Welfare and Institutions Code differentiate between 'alleged,' 'natural,' and 'presumed' fathers. [Citation.] Alleged fathers have less rights in dependency proceedings than biological and presumed fathers. [Citation.]" (*In re O. S*. (2002) 102 Cal.App.4th 1402, 1406.) An alleged father does not have a current interest in a child because his biological paternity or his presumed father status has not been established. (*Ibid*; *In re Zacharia D*. (1993) 6 Cal.4th 435, 449, fn. 15.)[6]

Here, appellant is an alleged father, with no legal interest in the minor child. There was no error in denying him reunification services and attendance at the subsequent hearings.[7] His status as an alleged father also means that he has no standing to challenge the jurisdiction and disposition rulings (other than, of course, the portion of the court's adjudication ruling finding that this is an appropriate case to rebut his status of

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[6] A fourth class of fathers exist—the de facto father—a person who has assumed the role of parent, such as a step-parent. (*In re Jerry P*. (2002) 95 Cal.App.4th 793, 801.)

[7] Welfare and Institutions Code section 361.5, subdivision (a) provides that except in certain circumstances, "whenever a child is removed from a parent's or guardian's custody, the juvenile court shall order the social worker to provide child welfare services to the child and the child's mother and statutorily presumed father or guardians." The court may also provide services for the child and a man adjudged to be the child's biological father if the court determines such services would benefit the child. (*Ibid*.)

a presumed father, and that such status had been rebutted by clear and convincing evidence.[8]

3. *Because His Status As A Presumed Father Was Rebutted, Appellant Lacks Standing to Challenge Matters Involving The Indian Child Welfare Act*

Appellant contends the trial court failed to give proper notice to the several bands of the Cherokee Nation and this failure requires reversal of the jurisdiction and disposition orders. The Department contends appellant has no standing to challenge the Indian Child Welfare Act ("ICWA") notices that it sent because he was not a "parent" under the provisions of ICWA, and was only an alleged father, not a party to this case when he filed his notice of appeal.

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[8] The Department contends appellant never appealed from the disposition order, that is, that appellant's two notices of appeal do not specify the December 18, 2002 disposition order. Appellant contends he did since (1) his two notices of appeal checked the section 360 box under the heading "The order appealed from was made under Welfare and Institutions Code section," and the "360" box has the words "(declaration of dependency)" right next to it, and (2) he also checked the "Removal of custody from parent or guardian" box. The Department observes that while he did check these boxes, he typed the date "November 6, 2002" by those boxes, and such date is the date of the jurisdiction hearing, not the disposition hearing. (For some reason, he later changed November 6 to November 7 on the notice of appeal forms.) We observe that on the first page of appellant's two notice of appeal forms, it states: "I appeal from the findings and orders of the court . . . On November 7, 2002, the dependency court ruled that I was an alleged father only and denied me reunification services. . . ."

Technically, the first appealable order in a dependency case is the disposition order, and orders made prior to it are reviewable in an appeal from the disposition order itself. (*In re Megan B*. (1991) 235 Cal.App.3d 942, 950.) Appellant's notices of appeal *were* filed within 60 days of the disposition order. Although the notices are not terribly clear as to what he is challenging, we find they are sufficient for a challenge of the jurisdiction order.

We have already determined that *under California dependency law*, appellant, as an alleged father, has no current interest in the minor child and thus no standing to challenge orders of the dependency court (save the order determining that his presumed father status was appropriately rebutted). Thus, the question we address here is whether *ICWA itself* gives appellant standing to challenge the sufficiency of the notices given by the Department to the Cherokee Nation.

25 U.S.C.A § 1914 states: "Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title."[9] Thus, to have standing to assert that the notification provisions of section 1912 were violated by the Department, appellant must be (1) the Indian child who is the subject of the state court proceedings, (2) a parent or an Indian custodian from whose custody the child was removed, or (3) the child's tribe.

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[9] 25 U.S.C.A. § 1911 addresses tribal versus state jurisdiction over child custody, foster care, and termination of parental rights proceedings, and provides for when each has such jurisdiction, and it gives Indian children, their Indian custodians, and the Indian children's tribes the right to intervene in state court proceedings for foster care placement or termination of parental rights.

Section 1912, among other things, provides for notice to an Indian child's parents, Indian custodian, and Indian tribe of involuntary state court proceedings involving foster care placement or termination of parental rights.

Section 1913 addresses voluntary consent, by a parent or Indian custodian, of the foster care placement or termination of parental rights.

Obviously appellant is not the child and he is not the tribe. And we have no trouble concluding appellant is also not a parent or Indian custodian from whose custody the minor child was removed. First, appellant does not claim to be an Indian custodian. Second, under the provisions of 25 U.S.C.A. § 1903 (9), the term " 'parent' means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established." In the instant case, appellant has been determined, by clear and convincing evidence, to not be the minor child's biological father, and he does not claim to be an Indian who lawfully adopted the child. Thus, he does not meet section 1903's definition of a parent, as used in section 1914. (By the very terms of section 1903 (9) definition's of "parent," and by case authority (*J.W*. v. *R.J.* (Alaska 1998) 951 P.2d 1206, 1214), a stepparent is not considered a parent under that statute, assuming that appellant could be considered a stepparent of the minor child.) Third, the minor was not removed from appellant's custody. The court in *Matter of Adoption of a Child of Indian Heritage* (1988) 111 N.J. 155, [543 A.2d 925, 937-938] stated that while the concept of removal from custody has been interpreted by some courts to mean physical custody, it would interpret the phrase to mean legal custody. In the instant case, neither construction would help appellant because he had neither physical nor legal custody of the minor child.

4. *Appellant Has Not Demonstrated That The Trial Court's Placement of the Minor In Foster Care Constitutes Reversible Error*

At the July 30, 2002 detention hearing, appellant's attorney informed the court that appellant had a brother whom appellant wanted the court to consider as an appropriate person with whom to place the minor child. The court ordered the Department to review the appellant's brother's home, and it gave the Department discretion to release the minor to this person if the Department found such placement appropriate.

Appellant asserts that the Department failed to investigate appellant's brother, and that the court erred in placing the minor in foster care rather than with the brother, because there is a statutory preference for placing minors with relatives. However, we cannot agree that there was error.

Section 361.3 of the Welfare and Institutions Code states in relevant part: "(a) In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request *by a relative of the child* for placement of the child *with the relative*. [¶s] (c) For purposes of this section: [¶] (1) 'Preferential consideration' means that *the relative seeking placement* shall be the first placement to be considered and investigated. [¶] (2) 'Relative' means an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words 'great,' 'great-great,' or 'grand' or the spouse of any of these persons even if the marriage was terminated by death or dissolution. However, only the following relatives shall be given preferential consideration for the

placement of the child: an adult who is a grandparent, aunt, uncle, or sibling." (Italics added.)

Appellant has not explained how, in the context of section 361.3, he is to be considered a relative of the minor child, and thus, he has not made the case that his brother is a relative of the child. Moreover, even if the brother were a person addressed by section 361.3, it has not been explained to this court how *appellant's* interests have been affected by having the child live in foster placement, that is, why *he*, rather than his brother, has standing to raise section 361.3 error. (*Cesar V*. v. *Superior Court* (2001) 91 Cal.App.4th 1023, 1034-1035; *In re Gary P*. (1995) 40 Cal.App.4th 875, 876-877.) Appellate courts reverse judgments and orders on the ground of error harmful to the appellant. And related to that rule, as applied here, section 361.3 addresses *requests by relatives* who want to care for children. Nothing in the record indicates that appellant's *brother* actually requested that the minor be placed with him.

DISPOSITION

The disposition order is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, Acting P.J.

We Concur:

KITCHING, J.

ALDRICH, J.